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5 LYNWOOD INVESTMENTS CY
6 LIMITED,
7 Plaintiff,
8 v.
9 MAXIM KONOVALOV, et al.,
10 Defendants.
11

12 Case No. [20-cv-03778-MMC](#)
13

14 **ORDER GRANTING MOTION TO**
15 **DISMISS**

16 Re: Dkt. No. 144

17 Before the Court is defendants Maxim Konovalov (“Konovalov”), Igor Sysoev
18 (“Sysoev”), Andrey Alexeev (“Alexeev”), Maxim Dounin (“Dounin”), Gleb Smirnoff
19 (“Smirnoff”), Angus Robertson (“Robertson”), NGINX, Inc. (BVI) (“NGINX BVI”), NGINX
20 Software, Inc., BV NGINX, LLC (“BV NGINX”), Runa Capital, Inc. (“Runa Capital”),
21 E.venture Capital Partners II, LLC (“E. Ventures”), and F5 Networks, Inc. (“F5”)’s
22 Consolidated Motion, filed May 27, 2021, “to Dismiss Plaintiff’s Amended Complaint”
23 (“AC”). Plaintiff, Lynwood Investments CY Limited (“Lynwood”), has filed opposition, to
24 which defendants have replied. The Court, having considered the papers filed in support
25 of and in opposition to the motion, rules as follows.

26 **I. BACKGROUND**

27 Lynwood alleges it is a “Cyprus limited liability company . . . prosecuting this action
28 in its capacity as the assignee of all rights and interests” of Rambler Internet Holding LLC
29 (“Rambler”), “one of the largest media companies and web portals in Russia.” (See AC
¶¶ 73-74, 97.) Lynwood further alleges Sysoev was “a programming talent at Rambler”
30 who, in order to “solve Rambler-specific issues related to handling large volumes of web

1 server traffic,” developed “the popular web server software^[1] that has become known
2 worldwide as Open Source NGINX.” (See AC ¶¶ 23-24.) In particular, Lynwood alleges
3 “Sysoev wrote his first line of NGINX-related software code” on October 23, 2001 (see
4 AC ¶ 23), and then spent “nine years of his Rambler employment working primarily on
5 Open Source NGINX” (see AC ¶ 195).

6 According to Lynwood, although “Sysoev first publicly released . . . Open Source
7 NGINX in 2004, without authorization from Rambler,” Rambler “made a business decision
8 to permit Sysoev to continue releasing Open Source NGINX . . . because such releases
9 highlighted the technical achievements of Rambler and its employee Sysoev, which
10 inured to Rambler’s benefit for attracting top software programmers.” (See AC ¶¶ 34,
11 210.) Lynwood further alleges Rambler’s Chief Technology Officer (“CTO”), Konovalov,
12 “repeatedly misrepresented to [Rambler] that Open Source NGINX had no independent
13 commercial value or prospects for monetization” (see AC ¶ 17) and “that its only use for
14 Rambler was to solve Rambler’s internal technical issues . . . and to burnish Rambler’s
15 reputation as a worldwide leader in technology innovation” (see AC ¶ 16). As a result,
16 Lynwood alleges, “Rambler never undertook efforts to monetize or commercialize Open
17 Source NGINX” (see AC ¶ 319) and “did not object to Konovalov and Sysoev earning an
18 income off of Open Source NGINX” when they later separated from Rambler in 2011 (see
19 AC ¶ 324).

20 Allegedly unbeknownst to Rambler, however, Sysoev and eight other Rambler
21 software programmers, while “work[ing] together in a tight-knit department devoted to
22 product development within Rambler known as the Network Operation Center (‘NOC’)
23 that was ring-fenced from the rest of the company” and overseen by Konovalov, along
24 with Popov, Rambler’s Deputy Chief Technology Officer, and Smirnoff, Head of the NOC
25 Department (see AC ¶¶ 10-11), were “secretly develop[ing] proprietary, commercial

27 ¹ As explained by Lynwood, “web server software” is a type of software that
28 analyzes requests to visit “a given web address” and “then ‘serves’ the requested web
page back to the visitor.” (See AC ¶ 175.)

1 versions of NGINX software code," which they called "NGINX Plus" (see AC ¶¶ 15, 215).

2 Lynwood alleges that, at some point in time, Konovalov, Sysoev, and Smirnoff
3 (collectively, the "Disloyal Employees"), along with their "third-party acquaintances"
4 Alexeev and Dounin (all five, collectively, the "Team") (see AC ¶ 99) "agreed that
5 together they would start their own company in San Francisco, California[,] to
6 commercialize Open Source NGINX by commercializing NGINX Plus and other
7 proprietary Open Source NGINX extensions, and then achieve their multimillion dollar
8 'exit' or 'payday' by selling the entire NGINX Enterprise² to a large U.S. technology
9 company" (see AC ¶ 214). Lynwood alleges that, in connection therewith, the Disloyal
10 Employees "orchestrated their resignations from Rambler" (see AC ¶¶ 25, 160), and that,
11 "by early April, 2011, when Konovalov and Sysoev were still employed by Rambler," the
12 Team secured "venture funding" from Runa Capital and E. Ventures (see AC ¶ 20), then
13 formed "NGINX Software, Inc. on May 4, 2011[,] NGINX BVI on July 6, 2011[,] and
14 NGINX DE in August 2011" (see AC ¶ 550), and thereafter "achieved the ultimate object
15 of their conspiracy when they sold Rambler's NGINX Enterprise to F5 through [a]
16 [m]erger [with NGINX BVI] for \$670 million" (see AC ¶ 568), which merger agreement
17 "closed on May 8, 2019" (see AC ¶ 217). Lynwood alleges Robertson, who had "joined
18 NGINX [Software, Inc.] as CEO in 2012" (see AC ¶ 84), "joined F5 as a result of the
19 merger between F5 and NGINX BVI" (hereinafter, "2019 Merger") (see AC ¶ 365).

20 Based on the above allegations, Lynwood in its AC, asserts twenty-five claims,
21 sixteen of which have been stayed by prior order,³ leaving the following nine claims

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23 ² As alleged in the AC, the "NGINX Enterprise" comprises "the purloined NGINX-
24 related business opportunities and enterprise, proprietary NGINX software (including
NGINX Plus), Open Source NGINX, and related intellectual property and goodwill." (See
AC ¶ 19.)

25 ³ By order filed October 1, 2020, the Honorable Lucy H. Koh, to whom the above-
26 titled action previously was assigned, ordered Lynwood to select from the initial
Complaint, filed June 8, 2020, ten claims to litigate through trial, and stayed the
27 remaining claims pending resolution of the ten selected claims. (See Order re: Case
Narrowing, Dkt. No. 107.) In its AC, Lynwood does not re-assert one of the ten selected
28 claims, namely, the initial Complaint's First Claim for Relief, titled "Civil Conspiracy
Among the Team, Robertson, Runa Capital, E. Ventures, NGINX BVI, NGINX DE,

1 subject to challenge by the instant motion: (1) First Claim for Relief, titled "Breach of
2 Employment Obligations Owed by Konovalov to Rambler," (2) Second Claim for Relief,
3 titled "Breach of Employment Obligations Owed by Sysoev to Rambler," (3) Fourth Claim
4 for Relief, titled "Breach of Konovalov's Duty to Act Fairly and Honestly With Rambler,"
5 (4) Seventh Claim for Relief, titled "Aiding and Abetting by Runa Capital and E. Ventures
6 of the Disloyal Employees' Fraud and Breaches of Their Duties of Honesty and Loyalty to
7 Rambler," (5) Eighth Claim for Relief, titled "Aiding and Abetting by F5 of the Disloyal
8 Employees' Fraud and Breaches of Their Duties of Honesty and Loyalty to Rambler," (6)

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10 NGINX Software, Inc., and BV NGINX." (See Compl., Dkt. No. 1.) The following sixteen
11 claims, as now listed in the AC, have been stayed: (1) Third Claim for Relief, titled
12 "Breach of Employment Obligations Owed by Smirnoff to Rambler," (2) Fifth Claim for
13 Relief, titled "Breach of the Duty to Act Fairly and Honestly With Rambler As To Sysoev
14 and Smirnoff," (3) Sixth Claim for Relief, titled "Aiding and Abetting by Alexeev and
15 Dounin of the Disloyal Employees' Breaches of Their Duties of Honesty and Loyalty to
16 Rambler," (4) Tenth Claim for Relief, titled "Tortious Interference with Contract Against
17 Runa Capital and E. Ventures," (5) Eleventh Claim for Relief, titled "Tortious Interference
18 with Contract Against F5," (6) Fifteenth Claim for Relief, titled "Berne Convention for the
19 Protection of Literary and Artistic Works and the Copyright Act (17 U.S.C. § 101, *et seq.*)
20 based on Contributory Copyright Infringement Against Defendants Runa Capital and E.
21 Ventures," (7) Sixteenth Claim for Relief, titled "Berne Convention for the Protection of
22 Literary and Artistic Works and the Copyright Act (17 U.S.C. § 101, *et seq.*) based on
23 Vicarious Copyright Infringement Against Defendants NGINX BVI, NGINX Software, Inc.
24 and F5," (8) Seventeenth Claim for Relief, titled "Cancellation of NGINX Trademark
25 Registration, U.S. Reg. No. 4,196,757, and Payment of Damages for Fraud, 15 U.S.C. §§
26 1064, 1119, 1120, as to NGINX Software, Inc. and F5," (9) Eighteenth Claim for Relief,
27 titled "Cancellation of NGINX (Stylized) Trademark Registration, U.S. Reg. No. 4,200,791
28 and Payment of Damages for Fraud, 15 U.S.C. §§ 1064, 1119, 1120 as to NGINX
Software, Inc. and F5," (10) Nineteenth Claim for Relief, titled "Cancellation of NGINX
PLUS Trademark Registration, U.S. Reg. No. 4,837,175 and Payment of Damages for
Fraud, 15 U.S.C. §§ 1064, 1119, 1120 as to NGINX DE, NGINX BVI and F5," (11)
Twentieth Claim for Relief, titled "Cancellation of NGINX Trademark Registration, U.S.
Reg. No. 5,973,515 and Payment of Damages for Fraud, 15 U.S.C. §§ 1064, 1119, 1120
as to NGINX BVI and F5," (12) Twenty-First Claim for Relief, titled "Cancellation of
NGINX CONTROLLER Trademark Registration, U.S. Reg. No. 5,973,527 and Payment
of Damages, 15 U.S.C. §§ 1064, 1119, 1120, as to NGINX BVI and F5," (13) Twenty-
Second Claim for Relief, titled "Cancellation of NGINX UNIT Trademark Registration,
U.S. Reg. No. 5,978,630 and Payment of Damages for Fraud, 15 U.S.C. §§ 1064, 1119,
1120 as to NGINX BVI and F5," (14) Twenty-Third Claim for Relief, titled "False
Advertising, 15 U.S.C. § 1125(a)(1)(B) as to All Defendants," (15) Twenty-Fourth Claim
for Relief, titled "Infringement of the NGINX, NGINX (Stylized) and NGINX PLUS
Trademarks, 15 U.S.C. §§ 1125(a)(1)(A) as to All Defendants," and (16) Twenty-Fifth
Claim for Relief, titled "Unjust Enrichment as to All Defendants." (See Pl. Lynwood
Invest. CY Limited's Submission in Compliance with Order re: Case Narrowing, Dkt. No.
110.)

1 Ninth Claim for Relief, titled “Tortious Interference with Contract Against Konovalov,
2 Robertson, NGINX Software, Inc., NGINX BVI, and NGINX DE,” (7) Twelfth Claim for
3 Relief, titled “Tortious Interference with Prospective Business Advantage Against All
4 Defendants,” (8) Thirteenth Claim for Relief, titled “Fraud Against the Disloyal Employees,
5 NGINX Software, Inc., NGINX DE and NGINX BVI,” and (9) Fourteenth Claim for Relief,
6 titled “Berne Convention for the Protection of Literary and Artistic Works and the
7 Copyright Act (17 U.S.C. § 101, et seq.) based on Direct Copyright Infringement Against
8 Defendants Konovalov, Sysoev, Alexeev, Dounin, Smirnoff, NGINX BVI, NGINX
9 Software, Inc., NGINX DE, Robertson and F5.”

10 **II. LEGAL STANDARD**

11 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure “can be
12 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
13 under a cognizable legal theory.” See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696,
14 699 (9th Cir. 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of
15 the claim showing that the pleader is entitled to relief.’” See Bell Atlantic Corp. v.
16 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a
17 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
18 allegations.” See id. Nonetheless, “a plaintiff’s obligation to provide the grounds of his
19 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
20 of the elements of a cause of action will not do.” See id. (internal quotation, citation, and
21 alteration omitted).

22 In analyzing a motion to dismiss, a district court must accept as true all material
23 allegations in the complaint and construe them in the light most favorable to the
24 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To
25 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted
26 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.
27 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be
28 enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555.

1 Courts “are not bound to accept as true a legal conclusion couched as a factual
2 allegation.” See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

3 **III. DISCUSSION**

4 By the instant motion, defendants seek an order dismissing, pursuant to Rule
5 12(b)(6) of the Federal Rules of Civil Procedure, each of the nine non-stayed claims. In
6 support thereof, defendants argue “Lynwood’s amended claims remain barred by the
7 applicable statutes of limitations,” “still fail to satisfy Rule 9(b)’s heightened pleading
8 requirements,” and “also fail[] to state a claim against defendants.” (See Defs.’ Mot. at 2-
9 3.) As set forth below, the Court finds Lynwood’s claims are either barred by the
10 applicable statutes of limitations or fail to state a claim, or both, and does not address
11 herein defendants’ remaining argument.

12 **A. Time-Barred**

13 **1. Statutes of Limitations⁴**

14 “A plaintiff must bring a cause of action within the limitations period after accrual of
15 the cause of action.” See River Colony Ests. Gen. P’ship v. Bayview Fin. Trading Grp.,
16 Inc., 287 F. Supp. 2d 1213, 1221 (S.D. Cal. 2003). Generally, a cause of action accrues
17 at “the time when, under the substantive law, the wrongful act is done, or the wrongful
18 result occurs, and the consequent liability arises.” See Norgart v. Upjohn Co., 21 Cal. 4th
19 383, 397 (1999) (internal quotation, citation, and alteration omitted). In other words, the
20 statute of limitations typically begins to run “when the cause of action is complete with all
21 of its elements.” See id.

22 “A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by
23 the applicable statute of limitations only when the running of the statute is apparent on
24 the face of the complaint,” see Von Saher v. Norton Simon Museum of Art at Pasadena,

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27 ⁴ As noted in a prior order filed March 30, 2021, “[t]he parties agree that California
28 law and U.S. federal law, not Russian law, supply the statutes of limitations in the instant
case.” (See Order Granting Mot. to Dismiss with Leave to Amend (“March 30 Order”) at
29:20, Dkt. No. 135.)

1 592 F.3d 954, 969 (9th Cir. 2010) (internal quotation and citation omitted), only if “it
2 appears beyond doubt that the plaintiff can prove no set of facts that would establish the
3 timeliness of the claim,” see Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1207
4 (9th Cir. 1995).

5 As noted, Lynwood filed the instant action on June 8, 2020.

6 **a. First and Second Claims for Relief – Breach of Employment
7 Obligations Owed to Rambler**

8 In its First Claim for Relief, Lynwood alleges Konovalov “breached his [contractual]
9 obligations to Rambler under the Konovalov Employment Agreement, the Rambler Code
10 of Ethics, [and] the Rambler Regulations” by “lying to Rambler about the value and utility
11 of Open Source NGINX . . . [,] by concealing from Rambler the Team’s scheme to steal
12 and then sell the NGINX Enterprise . . . [,] by encouraging, assisting, and persuading
13 Sysoev and Smirnoff to breach their obligations to Rambler . . . [,] by failing to protect
14 Rambler’s rights in the various intellectual property associated with Rambler’s NGINX
15 Enterprise,” and “by selling Rambler’s NGINX Enterprise for his own ill-gotten profits at
16 the exclusion of Rambler.” (See AC ¶¶ 576-80).⁵

17 In its Second Claim for Relief, Lynwood alleges Sysoev, by the same above-
18 referenced acts, “breached his [contractual] obligations to Rambler under the Sysoev
19 Employment Agreement, Sysoev Separation Agreement, the Rambler Code of Ethics, the
20 Rambler Regulations.” (See AC ¶¶ 587-91.).⁶

21 The statute of limitations for breach of contract is four years, see Cal. Civ. Proc.
22 Code § 337, and, a cause of action for breach of contract “generally accrues at the time

23
24 ⁵ Lynwood does not allege the specific contractual provisions assertedly breached
25 by the above-referenced conduct. Rather, Lynwood alleges Konovalov “owed Rambler
26 duties of loyalty and honesty” (see AC ¶ 574), possibly relying on a provision in the
Rambler Code of Ethics that “Management must conduct themselves honestly and
ethically” (see AC ¶ 109) and its allegation that Konovalov, as CTO, was “part of
Management” and signed a copy of the Code of Ethics (see AC ¶ 107).

27 ⁶ Lynwood does not, however, allege Sysoev was “part of Management” or that he
28 signed a copy of the Code of Ethics.

1 of the breach, regardless of whether any damage is apparent or whether the injured party
2 is aware of its right to sue," see Intermedics, Inc. v. Ventritex, Inc., 775 F. Supp. 1258,
3 1266 (N.D. Cal. 1991). As alleged in the AC, Konovalov and Sysoev breached their
4 contractual obligations "[b]y early 2010," when "execution of [their] covert scheme was
5 well underway" (see AC ¶ 43), or, at the latest, in 2011, when they incorporated entities
6 from which they sold the NGINX Enterprise.

7 Accordingly, in the absence of an exception, the First and Second Claims for
8 Relief are barred by the applicable statute of limitations.

9 **b. Fourth Claim for Relief – Breach of Konovalov's Duty to Act
10 Fairly and Honestly with Rambler**

11 In its Fourth Claim for Relief, Lynwood alleges Konovalov, "by virtue of his senior
12 management position as CTO of Rambler," owed Rambler "a heightened duty under . . .
13 Articles 53.1 and 53.3 of the Russian Civil Code . . . to act fairly and honestly vis-à-vis
14 Rambler and refrain from misappropriating corporate opportunities and assets such as
15 the NGINX Enterprise and to disclose any harmful actions he undertook to the detriment
16 of Rambler." (See AC ¶¶ 605-06.) Lynwood alleges Konovalov "breached his duties . . .
17 by concealing from Rambler the scope of the NGINX Enterprise . . . , by participating in
18 the conspiracy with the Team whereby the Team misappropriated Rambler's NGINX
19 Enterprise[,] and by covering up their actions through the destruction of evidence." (See
20 AC ¶ 608.) Lynwood further alleges "Konovalov's Article 53.1 and 53.3 duties continued
21 after he left the employment of Rambler." (See AC ¶ 606.)

22 The parties agree Russian law governs the merits of this claim.⁷ They disagree,
23 however, as to whether heightened duties under Russian statutory law apply to
24 Konovalov. Further, defendants argue that, even if Konovalov owed Rambler any
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27 ⁷ Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, a district court, in
28 determining foreign law, "may consider any relevant material or source, including
testimony, whether or not submitted by a party or admissible under the Federal Rules of
Evidence." See Fed. R. Civ. P. 44.1.

1 heightened duties, “those duties ended with the termination of his employment with
2 Rambler” (see Defs.’ Mot. at 24:15-16), whereas Lynwood contends Konovalov’s “duties
3 survived separation from Rambler” (see Pl.’s Opp’n at 23-15-16).

4 In support of Lynwood’s argument, Lynwood’s expert asserts “Russian law does
5 not permit a company’s former . . . employee who falls within Article 53 . . . to take
6 actions that are in breach of trust of the former employee’s corporate position and result
7 in financial injury to the company,” and, in support thereof, cites two Russian cases in
8 which a former director was found to have acted in bad faith for failing to return the
9 company’s loan documents upon separating from the company. (See Decl. of Alexander
10 Christophoroff (“Christophoroff Decl.”) ¶¶ 95-96, Dkt. No. 124.) As defendants’ expert
11 points out, however, neither case stands for the broad proposition Lynwood argues here,
12 that Article 53 imposes on former employees a continuing “legal duty to act fairly and
13 honestly” (see AC ¶ 606) but, rather, are predicated on acts committed prior to departure
14 from the company and specific requirements pertaining to the maintaining of documents
15 under Russian law.

16 Accordingly, even assuming, arguendo, Konovalov owed Rambler heightened
17 duties under Russian statutory law, the Court finds the existence of any such duty would
18 have ended in April 2011 when Konovalov left Rambler.

19 The statute of limitations for breach of fiduciary duty, however, is three years,
20 where, as here, the “gravamen of the complaint is that defendant’s acts constituted actual
21 or constructive fraud.” See Thomson v. Canyon, 198 Cal. App. 4th 594, 606-07 (2011)
22 (finding statute of limitations for breach of fiduciary duty is three years if breach is
23 fraudulent and four years if breach is nonfraudulent) (citing Cal. Civ. Proc. Code §§ 343,
24 338(d)).

25 Accordingly, in the absence of an exception, the Fourth Claim for Relief likewise is
26 barred by the applicable statute of limitations.

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c. Seventh, Eighth, and Thirteenth Claims for Relief – Aiding and Abetting of the Disloyal Employees’ Fraud and Breaches of Their Duties of Honesty and Loyalty to Rambler; Fraud

In its Seventh Claim for Relief, Lynwood alleges Runa Capital and E. Ventures “had actual knowledge of the Disloyal Employees’ fraudulent conduct and breaches of their Article 53 duties” (see AC ¶ 627) but nonetheless provided the Disloyal Employees “with substantial assistance in achieving the ultimate goal of their conspiracy – the misappropriation of Rambler’s NGINX Enterprise and its ultimate sale to F5 for their own ill-gotten profits at the exclusion of Rambler” (see AC ¶ 631).

In its Eighth Claim for Relief, Lynwood alleges F5 similarly knew about the Disloyal Employee's fraudulent conduct and breaches of duties, but nonetheless provided them with substantial assistance in achieving their conspiracy.

In its Thirteenth Claim for Relief, Lynwood alleges the Disloyal Employees “intentionally misrepresented to Rambler the value of Open Source NGINX and related business opportunities” (see AC ¶ 713), “fraudulently concealed from Rambler the existence of the lucrative business opportunities associated with Open Source NGINX and NGINX Plus” as well as “the existence and ongoing development” of NGINX Plus (see AC ¶¶ 714-15), and “fraudulently induced Rambler to continue investing resources in Open Source NGINX and NGINX Plus” (see AC ¶ 716). Lynwood further alleges the Disloyal Employees, along with NGINX Software, Inc., NGINX DE, and NGINX BVI, “direct[ed] the theft of Rambler’s equipment and destruction of evidence.” (See AC ¶ 718.)

The statute of limitations for fraud, see Cal. Civ. Proc. Code § 338(d), as well as the statute for aiding and abetting fraud or a fraudulent breach of fiduciary duty, is three years, see *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1478 (2014) (noting “statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort”), running from the date of “discovery, by the aggrieved party, of the facts constituting the fraud.” see Cal. Civ. Proc. Code § 338(d).

Any of the above-referenced alleged fraudulent conduct, however, could not have

1 occurred later than November 2012, when Smirnoff, the last Disloyal Employee
2 remaining at Rambler, left the company, as “[a] fraud claim based upon the suppression
3 or concealment of a material fact must involve a defendant who had a legal duty to
4 disclose the fact,” see Hoffman v. 162 N. Wolfe LLC, 228 Cal. App. 4th 1178, 1186
5 (2014), and the Disloyal Employees no longer owed Rambler any such duty once they
6 left its employ. (See id. at 1187 (noting a duty arises if there is “a fiduciary relationship
7 between the parties” or “some sort of transaction between the parties,” e.g., “between
8 seller and buyer, employer and prospective employee, doctor and patient, or parties
9 entering into any kind of contractual agreement”)).

10 Accordingly, whether the Seventh, Eighth, and Thirteenth Claims for Relief are
11 barred by the applicable statute of limitations is, absent an exception, dependent on
12 Lynwood’s showing with respect to discovery.

13 **d. Ninth Claim for Relief – Tortious Interference with Contract**

14 In its Ninth Claim for Relief, Lynwood alleges “Sysoev and Rambler were parties to
15 and bound by the Sysoev Employment Agreement, the Sysoev Separation Agreement,
16 the Rambler Code of Ethics and the Rambler Regulations” (see AC ¶ 650), and
17 Konovalov, Robertson, NGINX Software, Inc., NGINX BVI, and NGINX DE, “through
18 2019, . . . actively encouraged and persuaded Sysoev to breach his obligations to
19 Rambler” (see AC ¶¶ 658-59).

20 The statute of limitations for tortious interference with contract is two years, see
21 DC Comics v. Pac. Pictures Corp., 938 F. Supp. 2d 941, 948 (C.D. Cal. 2013) (citing Cal.
22 Civ. Proc. Code § 339(1)), running from the “discovery of the loss or damage suffered by
23 the aggrieved party,” see Cal. Civ. Proc. Code § 339(1).

24 Here, however, any breach of the above-referenced contracts would have
25 occurred, at the latest, by 2011. See supra Section III.A.1.a. Consequently, any cause
26 of action for tortious interference would have occurred, at the latest, by that time as well.
27 See Trembath v. Digardi, 43 Cal. App. 3d 834, 836 (Ct. App. 1974) (noting “the accrual
28 date [for tortious interference with contract] could not be later than the actual breach of

1 the contract by the party who was wrongfully induced to breach").

2 Accordingly, whether the Ninth Claim for Relief is barred by the applicable statute
3 of limitations is, absent an exception, dependent on Lynwood's showing with respect to
4 discovery.

5 **e. Twelfth Claim for Relief – Tortious Interference with
6 Prospective Business Advantage**

7 In its Twelfth Claim for Relief, Lynwood alleges Rambler "had a prospective
8 economic advantage in the form of the NGINX Enterprise that, but for [d]efendants'
9 unlawful conduct detailed [in the AC], Rambler could have and would have sold for a
10 massive profit." (See AC ¶ 692; see also AC ¶ 694 (alleging unlawful conduct "includ[ed],
11 without limitation, breaches of the Disloyal Employees' duties of honesty and loyalty to
12 Rambler; aiding and abetting those breaches; fraud; aiding and abetting fraud; fraud on
13 the USPTO; tortious interference with contract; false advertising; [and] copyright
14 infringement").)

15 The statute of limitations for tortious interference with prospective business
16 advantage is two years, see Wild Rivers Waterpark Mgmt. LLC v. Katy WP Grp., LLC,
17 2019 WL 6998669, at *8 (C.D. Cal. Feb. 29, 2019) (citing Cal. Civ. Proc. Code § 339(1)),
18 running from the "discovery of the loss or damage suffered by the aggrieved party," see
Cal. Civ. Proc. Code § 339(1).

19 Although some of the above-cited allegations set forth conduct that, as discussed
20 above, could not have occurred later than the Disloyal Employees' respective dates of
21 departure from Rambler, some of those allegations set forth conduct that is within two
22 years of the filing of the initial Complaint. (See, e.g., AC ¶ 759 (alleging "from 2013
23 through the present, the Direct Copyright Infringement Defendants . . . have introduced
24 20 or more commercial releases of NGINX Plus . . . based on . . . the Pre-2012 NGINX
25 Software").)

26 Accordingly, it is not apparent from the face of the AC that the Twelfth Claim for
27 Relief is barred by the statute of limitations.

28 //

f. Fourteenth Claim for Relief – Direct Copyright Infringement

In its Fourteenth Claim for Relief, Lynwood alleges it is “the owner by assignment, of all right, title and interest in and to NGINX Plus and Open Source NGINX, in both source code and executable form, conceived and/or developed before the end of 2011, when Sysoev left the employ of Rambler (collectively, ‘Pre-2012 NGINX Software’), including all copyright rights inherent therein or appurtenant thereto.” (See AC ¶ 745.)

The statute of limitations for copyright infringement is three years, see 17 U.S.C. § 507(b), and where, as here, “creation rather than infringement is the gravamen of an authorship claim, the claim accrues on account of creation, not subsequent infringement, and is barred three years from ‘plain and express repudiation’ of authorship,” see Aalmuhammed v. Lee, 202 F.3d 1227, 1230-31 (9th Cir. 2000); see also Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013) (noting “as distinct from claims of infringement,” where “each new infringing act causes a new claim to accrue,” claims of ownership “accrue only once”). Further, “an untimely ownership claim will bar a claim for copyright infringement where the gravamen of the dispute is ownership, at least where . . . the parties are in a close relationship.” See id. at 1258; see also id. at 1256-57 (finding parties in close relationship where they enter into a business “deal” or “agreement”).

Repudiation requires “an act that is adverse to the party whose ownership is being repudiated.” See Zahedi v. Miramax, LLC, 2021 WL 6882408, at *7 (C.D. Cal. Nov. 24, 2021); see also Aalmuhammed, 202 F.3d at 1231 (finding “movie credits plainly and expressly repudiated authorship, by listing [plaintiff] far below the more prominent names”). Here, defendants argue Sysoev plainly and expressly repudiated Rambler’s ownership of copyright when he released Open Source NGINX in 2004 “without authorization” from Rambler and “with a copyright notice containing a clear claim that he held copyright in the software as its author—‘Copyright (C) 2002-2004 Igor Sysoev’” (see Defs.’ Mot. at 8:19-22), which notice, defendants argue, was an “unequivocal act of ownership” (see *id.* at 8:21-22). In response, Lynwood argues “[d]efendants never plainly

1 and expressly repudiated Rambler's ownership of the Open Source NGINX," because
2 "Sysoev's copyright notice on Open Source NGINX reflected Sysoev's authorship, not
3 ownership[,] which is distinct under Russian law." (See Pl.'s Opp'n at 24:15-16, 20-21.)
4 The parties disagree as to whether such dispute is to be determined under Russian law
5 or federal law.

6 As the Court has federal question jurisdiction in this case, "federal common law
7 applies to the choice-of-law inquiry." See Abram v. C.R. England, Inc., 2020 WL
8 5077365, at *5 (C.D. Cal. Apr. 15, 2020). "Federal common law follows the Restatement
9 (Second) of Conflict laws," see id., which provides that the law of the jurisdiction with "the
10 most significant relationship" to the property and parties determines the parties' interests
11 in that property, see Restatement (Second) of Conflict of Laws § 222 (1971).
12 Consequently, the law of the country with "the most significant relationship" to a work
13 controls the issue of ownership. See Itar-Tass Russian News Agency v. Russian Kurier,
14 Inc., 153 F.3d 82, 90 (2d Cir. 1998) (noting "[c]opyright is a form of property"). In
15 determining which country has "the most significant relationship" to a work, courts
16 consider as relevant factors "the nationality of the author and the place of initial creation
17 or publication." See O'Reilly v. Valley Ent., Inc., 2011 WL 13258234, at *8 (N.D. Cal. Jan.
18 4, 2011), R. & R. adopted, 2011 WL 13260734 (N.D. Cal. Feb. 16, 2011); see also Lahiri
19 v. Universal Music & Video Distrib., Inc., 513 F. Supp. 2d 1172, 1176 n.4 (C.D. Cal. 2007)
20 (finding Indian law controlled issue of copyright ownership where work was "created in
21 India"); Itar-Tass, 153 F.3d at 90 (finding Russian law controlled issue of copyright
22 ownership where works were "created by Russian nationals and first published in
23 Russia"). Here, the author of the software is Sysoev, a Russian national, and the place
24 of initial creation is Russia. Consequently, Russia has the most significant relationship to
25 the work, and, accordingly, Russian law governs the above-referenced issue.

26 Although, under federal law, a copyright notice consists of the © symbol, the year
27 of first publication, and "the name of the owner of the copyright," see 17 U.S.C.
28 § 401(b), under Russian law, a copyright notice consists of the © symbol, the year of first

1 publication, and “the name of the author or copyright owner,” see Irina Ozolina &
2 Anastasia Zalesova, Copyright: Russia, 11 (2022) (emphasis added). Here, as Lynwood
3 points out, the license terms below Sysoev’s copyright notice twice refer to the software’s
4 “author,” as opposed to the “copyright holder.” (See AC ¶ 376; see also Req. for Judicial
5 Notice (“RJN”) Ex. A, Dkt. No. 89.) Under such circumstances, the Court cannot
6 determine from the face of the AC that Sysoev’s copyright notice constituted a clear and
7 express repudiation of Rambler’s ownership.

8 Defendants next argue that “[e]ven without the copyright notice, . . . Rambler’s
9 alleged ownership was plainly repudiated no later than . . . 2012” by Sysoev’s public
10 statements in an interview published in Free Software Magazine. (See Def.’s Mot. at
11 8:24-25, 9:2-6.) Repudiation of ownership, however, must be “communicated to the
12 claimant,” and Lynwood does not allege Rambler or Lynwood ever saw the 2012
13 interview. See Scorpio Music (Black Scorpio) S.A. v. Willis, 2013 WL 790940, at *2, *6
14 (S.D. Cal. Mar. 4, 2013) (denying motion to dismiss copyright ownership claim where
15 plaintiffs failed to show defendant “had actual notice” of copyright registrations and record
16 labels that allegedly constituted plain and express repudiation).

17 Accordingly, it is not apparent from the face of the AC that the Fourteenth Claim
18 for Relief is barred by the statute of limitations.

19 **2. Delayed Accrual**

20 In opposing the instant motion, Lynwood, as before, does not dispute the above-
21 listed limitations periods. Rather, again relying on theories that (1) the “2019 Merger was
22 the last overt act” in furtherance of an alleged conspiracy (see Pl.’s Opp’n at 2:24), (2) its
23 claims are “timely under the continuing violation doctrine” (see id. at 16:21),
24 (3) defendants’ “fraudulent concealment” delayed accrual (see id. at 11:4), and (4) its
25 claims are “timely under the discovery rule” (see id. at 16:17-18), it contends those
26 periods began to run at the time of the 2019 Merger and, in support thereof, has added
27 new factual allegations.

28 The Court discusses in turn below each such newly stated argument.

a. Last Overt Act

Under California law, civil conspiracy “is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.” See Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994).

[W]hen a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of a plaintiff's claims [based thereon] until the 'last overt act' pursuant to the conspiracy has been completed." See Wyatt v. Union Mortg. Co., 24 Cal. 3d 773, 786 (1979); see also Kenworthy v. Brown, 248 Cal. App. 2d 298, 301 (Ct. App. 1967) (noting "[a] cause of action based on a civil conspiracy accrues on the date of the commission of the last overt act in pursuance of the conspiracy"). "For an act to be an overt act delaying the commencement of the limitations period," however, "it must be performed in furtherance of the conspiracy," see Risk v. Kingdom of Norway, 707 F. Supp. 1159, 1170 (N.D. Cal. 1989), aff'd, 936 F.2d 393 (9th Cir. 1991), and, as relevant to that determination, California law distinguishes "acts which are properly classifiable as 'overt acts' in furtherance of the conspiracy" from "activities of conspirators after perpetration of the principal object of the conspiracy which may evidence the prior conspiracy," see Livett v. F.C. Financial Assoc., 124 Cal. App. 3d 413, 419 (1981).

By order filed March 25, 2021, Judge Koh found Lynwood had not “alleged a conspiracy,” let alone “a large, decades-long conspiracy whose object was to sell off the NGINX Enterprise to a third party.” (See Order Granting Mots. to Dismiss with Leave to Amend (“March 25 Order”) at 16:22, Dkt. No. 134.) In that regard, Judge Koh, noting a “civil conspiracy claim requires an underlying tort,” found Lynwood “ha[d] not stated a claim for the underlying torts” and “ha[d] not even specified the torts that the defendants allegedly conspired to commit.” (See *id.* at 31:25, 32:6, 8-9.)

In the AC, Lynwood now alleges Konovalov, Sysoev, Alexeev, Dounin, Smirnoff, Robertson, NGINX BVI, NGINX Software, Inc., NGINX DE, Runa Capital, and E. Ventures “conspired to breach the Disloyal Employees’ duties to Rambler, to tortiously

interfere with Rambler's contractual rights, to tortiously interfere with Rambler's prospective business advantage, and to defraud Rambler." (See AC ¶¶ 569-70.) The foregoing allegation does not specify the particular causes of action to which Lynwood seeks to apply a theory of conspiracy and, for that reason alone, its reliance on the last overt act doctrine is unavailing.

In any event, given that a conspiracy terminates “when the substantive offense underlying [the] conspiracy [i]s completed,” see People v. Williams, 97 Cal. App. 3d 382, 389 (Ct. App. 1979),⁸ and, given that, as previously discussed, the conduct on which the Fourth,⁹ Seventh, Eighth, Ninth, and Thirteenth Claims for Relief are based could not have occurred later than the Disloyal Employees’ respective dates of departure from Rambler, see supra Sections III.A.1.b-d, any conspiracy relating to said claims could not have extended past November 2012, when Smirnoff, the last Disloyal Employee remaining at Rambler, left the company.¹⁰

Accordingly, to the extent Lynwood relies on the last overt act doctrine, it fails to show its claims are not barred by the applicable statutes of limitations.

b. Continuing Violation Doctrine

“The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of

⁸ Although People v. Williams dealt with a criminal conspiracy, “[t]he differences between civil and criminal conspiracies,” for purposes of statutes of limitations, are, as characterized by the California Supreme Court, essentially “beside the point.” See Wyatt, 24 Cal. 3d at 787; see also Livett, 124 Cal. App. 3d at 419 (finding “conclusions” regarding last overt act doctrine in “case [that] dealt with a criminal conspiracy . . . applicable as well to a civil conspiracy”).

⁹ As to the Fourth Claim for Relief, the only defendants that potentially could be held liable as co-conspirators are Sysoev and Smirnoff, as they are the only defendants whom Lynwood alleges owed the same duties as Konovalov to Rambler. See Applied Equip., 7 Cal. 4th at 511 (holding “liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty”).

¹⁰ The First and Second Claims for Relief are not considered in the above analysis, as they are not tort claims, but, rather, breach of contract claims. (See Christophoroff Decl. ¶ 53 (stating both claims “allege contractual breaches”).)

1 them upon commission or sufferance of the last of them.” See Aryeh v. Canon Bus.
2 Sols., Inc., 55 Cal. 4th 1185, 1192 (2013).

3 In the March 25 and March 30 Orders, Judge Koh found “Lynwood d[id] not
4 plausibly allege that [d]efendants engaged in a series of continuing wrongs for nearly two
5 decades—from the time that Sysoev wrote the first line of the NGINX Software in 2001
6 until the F5 merger in 2019” (see, e.g., March 25 Order at 17:13-15), and that “Lynwood
7 d[id] not explain why the series of continuing wrongs was not complete in 2011, when the
8 NGINX Enterprise was allegedly stolen from Rambler” (see, e.g., id. at 31:18-19).

9 In its opposition, the only argument Lynwood makes for the proposition that its
10 claims are timely under the continuing violation doctrine is that “[d]efendants’ violations
11 continued through F5’s misrepresentations to the United States Patent and Trademark
12 Office (‘USPTO’) in December 2019.” (See Pl.’s Opp’n at 16:19-21.) As noted earlier
13 herein, however, all claims relating to trademark violations, specifically, the Seventeenth
14 through Twenty-Second, and Twenty-Fourth Claims for Relief, have been stayed, and the
15 claims presently under consideration allege “a series of discrete, independently verifiable
16 and actionable wrongs,” see Aryeh, 55 Cal. 4th at 1198, all, as Judge Koh noted, ending
17 in 2011.

18 Accordingly, to the extent Lynwood relies on the continuing violation doctrine, it
19 fails to show its claims are not barred by the applicable statutes of limitations.

20 **c. Fraudulent Concealment**

21 “The purpose of the fraudulent concealment doctrine is to prevent a defendant
22 from concealing a fraud until such a time as the party committing the fraud could plead
23 the statute of limitations to protect it.” See In re Animation Workers Antitrust Litig., 123 F.
24 Supp. 3d 1175, 1194 (N.D. Cal. 2015) (internal quotation, citation, and alteration omitted);
25 see also id. at 1200 (finding defendants concealed fraud where they “made misleading,
26 pretextual statements and took affirmative steps to keep the alleged conspiracy a
27 secret”). Consistent therewith, “[a] statute of limitations may be tolled if the defendant
28 fraudulently concealed the existence of a cause of action in such a way that the plaintiff,

1 acting as a reasonable person, did not know of its existence.” See Hexcel Corp. v. Ineos
2 Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012).

3 “The plaintiff bears the burden of pleading and proving fraudulent concealment.”
4 See In re Animation Workers, 123 F. Supp. 3d at 1194. To plead fraudulent
5 concealment, “a plaintiff must show that defendant affirmatively misled it, and that plaintiff
6 had neither actual nor constructive knowledge of the facts giving rise to its claim despite
7 its due diligence in trying to uncover those facts.” See In re Coordinated Pretrial Proc. in
8 Petroleum Prod. Antitrust Litig., 782 F. Supp. 487, 489 (C.D. Cal. 1991) (internal
9 quotation, citation, and alteration omitted). “A plaintiff’s lack of knowledge of its claim is
10 essential to establish fraudulent concealment,” and “[o]nce the plaintiff has knowledge or
11 constructive knowledge of all the operative facts underlying its claim, the statute begins to
12 run.” See In re Cathode Ray Tube (CRT) Antitrust Litig., 2016 WL 8669891, at *5 (N.D.
13 Cal. Aug. 22, 2016). “Constructive knowledge exists when a plaintiff should have been
14 alerted to facts that, following duly diligent inquiry, could have advised it of its claim.” See
15 Petroleum Products, 782 F. Supp. at 493 (internal quotation and citation omitted); see
16 also Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 502 (9th Cir. 1988) (noting
17 “[a]ny fact that should excite [plaintiff’s] suspicion is the same as actual knowledge of his
18 entire claim”).

19 In the March 25 and March 30 Orders, Judge Koh found “Lynwood ha[d] not
20 plausibly alleged that it did not have actual or constructive notice of the facts giving rise to
21 its claim” (see, e.g., March 25 Order at 19:9-10), in that the initial Complaint’s “allegations
22 support[ed] the conclusion that, as early as 2001, Rambler was aware of the value of the
23 NGINX Enterprise” (see, e.g., id. at 19:14-15) and that “as of 2011, Rambler was aware
24 that Sysoev, Konovalov, and the Team would exercise ownership rights over NGINX”
25 (see, e.g., id. at 20:2-3)).

26 In the AC, Lynwood adds allegations that “Rambler and Lynwood located an
27 aging, non-descript server,” called the “Yam Server,” which was “located in an offsite
28 Rambler server farm that had been disconnected and had its data deleted,” and which

1 "the conspirators had commandeered for communicating between themselves and . . .
2 had never been integrated with Rambler's company-wide email systems." (See AC
3 ¶¶ 13-14.) Additionally, Lynwood now alleges that "Rambler was previously unaware of
4 the existence of the Yam Server," which "contained a massive number of emails and
5 other materials" revealing the alleged conspiracy, and that it located said server "only
6 after one of the co-conspirators, Alexander Korotkov, came forward in 2019[,] blew the
7 whistle to Rambler and Lynwood concerning the conspirators scheme" (see AC ¶¶ 13-
8 15), and "disclosed to Rambler and Lynwood where to investigate" (see AC ¶ 445).

9 Pointing to said allegations, Lynwood argues that "because the Disloyal
10 Employees used separate servers," including the Yam Sever, "to carry out their
11 conspiracy and had wiped and stolen those servers" (see Pl.'s Opp'n at 14:12-13),
12 Rambler "could not have uncovered the conspirators' scheme until Korotkov blew the
13 whistle in 2019" (see id. at 13:22-23). Irrespective of the allegedly "ring-fenced nature of
14 the Yam Server" (see AC ¶ 345) and the NOC department, however, other allegations in
15 the AC support the conclusion that Rambler had at least constructive knowledge of
16 sufficient facts giving rise to its claims long before 2019.

17 In particular, even if "Sysoev and Konovalov fraudulently concealed from Rambler
18 that they were contemplating the prospect of providing proprietary products such as
19 NGINX Plus" (see AC ¶ 323), both Sysoev and Konovalov, in their respective exit
20 interviews in April 2011, informed Rambler, that, upon resigning, they would be "earning
21 an income off of Open Source NGINX" (see AC ¶ 324), a statement that, given
22 Konovalov's "repeated[] misrepresent[ation] to [Rambler] that Open Source NGINX had
23 no independent commercial value or prospects for monetization" (see AC ¶ 17), should
24 have put Rambler on inquiry notice that Sysoev's and Konovalov's representations that
25 they were not working on anything having commercial value were untrue.¹¹

26
27 ¹¹ As Lynwood acknowledges, Rambler is "one of the largest media companies
28 and web portals in Russia" (see AC ¶ 97), and "web server software like . . . Open
Source NGINX," while "provided on an open-source basis," is typically "commercialized
by offering proprietary fee-based enhanced enterprise features, functionality and services

1 Moreover, Lynwood alleges that the Team shortly thereafter proceeded to form,
2 through public filings, “NGINX Software, Inc. on May 4, 2011[,] NGINX BVI on July 6,
3 2011[,] and NGINX DE in August 2011” (see AC ¶ 550), that, starting in 2011, those
4 entities registered six different trademarks containing “NGINX” (see AC ¶¶ 803, 826, 851,
5 875, 895, 913), and that, starting in 2013, Sysoev and Konovalov, along with other
6 defendants, introduced “20 or more commercial releases of NGINX Plus and related
7 extensions” (see AC ¶ 759).

8 Additionally, Lynwood alleges, Sysoev, in a January 2012 interview with an online
9 magazine, publicly described NGINX, Inc. as a “commercial entity” that was “going to
10 produce a set of paid extensions on top of the [O]pen [S]ource NGINX that would
11 constitute a viable commercial software product” (see RJN Ex. B at 4), and thereafter, on
12 August 22, 2013, “[t]he first formal announcement of the general commercial availability
13 of the initial release of NGINX Plus . . . was issued,” which stated, “NGINX Plus is the
14 fully supported, commercial version of NGINX” (see AC ¶ 740).

15 Under all of the above circumstances, even if Rambler did not have actual
16 knowledge of the defendants’ wrongdoing, it had sufficient information “to warrant an
17 investigation which, if reasonably diligent, would have led to the discovery” of the facts on
18 which the instant claims are based, namely, Konvalov and Sysoev’s development of
19 NGINX Plus while employed by Rambler and exercise of ownership rights therein. See
20 Hexcel, 681 F.3d at 1060 (noting “[f]ull knowledge often awaits discovery, and the very
21 notion of ‘inquiry notice’ implies something less than that”); see also Conmar, 858 F.2d at
22 504 (noting “there can be no fraudulent concealment where,” a plaintiff whose “suspicions
23 have been or should have been excited, . . . could have then confirmed his earlier
24 suspicion by a diligent pursuit of further information”). In sum, Lynwood had constructive
25 knowledge of the facts giving rise to its claims by 2011 or at least by 2013 but failed to
26 act diligently in discovering its claims.

27 _____
28 relating to the web server software” (see AC ¶ 178) (emphasis added).

1 Accordingly, to the extent Lynwood relies on fraudulent concealment, it fails to
2 show its claims are not barred by the applicable statutes of limitations.

3 **d. Discovery Rule**

4 Under California law, the discovery rule “postpones accrual of a cause of action
5 until the plaintiff discovers, or has reason to discover, the cause of action.” See Norgart,
6 21 Cal. 4th at 389. As discussed earlier herein, the discovery rule applies by statute to
7 the accrual of causes of action predicated on fraud, see Cal. Civ. Proc. Code § 338(d), as
8 well as to causes of action predicated on tortious interference with contract and
9 prospective business advantage, see Cal. Civ. Proc. Code § 339(1). Additionally, the
10 discovery rule has been held to apply to causes of action predicated on breach of
11 contract and breach of fiduciary duty. See Apr. Enterprises, Inc. v. KTTV, 147 Cal. App.
12 3d 805, 830 (Ct. App. 1983) (noting California courts apply discovery rule to breach of
13 contract actions involving fraud or misrepresentation); see id. at 827 (noting “[i]t is well-
14 settled that the discovery rule applies to causes of action involving the breach of a
15 fiduciary relationship”).

16 “*A plaintiff discovers the cause of action the moment he at least suspects a *factual**

17 *basis*, as opposed to a *legal theory*, for the elements of the claim—in other words, when

18 [such] plaintiff suspects that someone has done something wrong to him.” See DC
19 Comics, 938 F. Supp. 2d at 951 (explaining “a plaintiff need not suspect facts supporting

20 *each specific legal element of a particular cause of action

21 to whether the plaintiffs have reason to at least suspect that a *type* of wrongdoing has

22 injured them”) (internal quotation, citation, and alteration omitted) (emphases in original).

23 A plaintiff “has reason to suspect when he has notice or information of circumstances to

24 put a reasonable person on inquiry.” See Norgart, 21 Cal. 4th at 398 (internal quotation

25 omitted). “So long as a suspicion exists, it is clear that the plaintiff must go find the facts;

26 [he] cannot wait for the facts to find [him].” See DC Comics, 938 F. Supp. 2d at 951.*

27 In its opposition, Lynwood argues “[t]he facts establishing fraudulent concealment
28 also render [its] claims timely under the discovery rule.” (See Pl.’s Opp’n at 16:17-18.)

1 As explained above, however, Lynwood had reason to discover its claims by 2011 or at
2 least by 2013, the year the initial release of NGINX Plus was announced, but sat on its
3 rights until 2020, filing the instant action only after NGINX BVI was sold for \$670 million in
4 2019. See supra Section III.A.2.c.

5 Accordingly, to the extent Lynwood relies on the discovery rule, it fails to show its
6 claims are not barred by the applicable statutes of limitations.

7 **3. Conclusion: Timeliness**

8 As discussed above, all of the non-stayed claims, with the exception of the Twelfth
9 and Fourteenth Claims for Relief, are barred by the applicable statutes of limitations and,
10 accordingly, will be dismissed on that ground.

11 Further, as set forth below, the Twelfth and Fourteenth Claims for Relief are
12 subject to dismissal for failure to state a claim, and, even if the Seventh, Eighth, Ninth,
13 and Thirteenth Claims for Relief were not time-barred, those claims with limited
14 exception¹² are subject to dismissal on that ground as well.

15 **B. Failure to State a Claim**

16 **1. Seventh Claim for Relief – Aiding and Abetting by Runa Capital and E.
17 Ventures of the Disloyal Employees’ Fraud and Breaches of Their
18 Duties of Honesty and Loyalty to Rambler**

19 Lynwood contends California law governs this claim. Defendants contend Russian
20 law governs,¹³ but argue that even under California law, the claim fails.

21 Under California law, “[l]iability may be imposed on one who aids and abets the
22 commission of an intentional tort if the person (a) knows the other's conduct constitutes a
23 breach of duty and gives substantial assistance or encouragement to the other to so act
24 or (b) gives substantial assistance to the other in accomplishing a tortious result and the

25 ¹² The one exception is the Thirteenth Claim for Relief as alleged against the
26 Disloyal Employees.

27 ¹³ There is no dispute that under Russian law, a “standalone cause[] of action” for
28 “aiding and abetting” does not exist. (See Reply Decl. of Alexander Muranov Pursuant to
FRCP 44.1 in Support of Mot. to Dismiss Compl. (“Muranov Reply Decl.”) ¶ 42, Dkt. No.
129-1.)

1 person's own conduct, separately considered, constitutes a breach of duty to the third
2 person." See Casey v. U.S. Bank Nat. Assn., 127 Cal. App. 4th 1138, 1144 (2005)
3 (internal quotation, citation, and alteration omitted). Here, Lynwood proceeds on the first
4 of the above two theories. (See AC ¶¶ 627, 631; see also Pl.'s Opp'n at 20:13-14
5 (arguing Runa Capital and E. Ventures "knew about the Disloyal Employees' tortious
6 conduct and willingly aided and abetted it").)

7 "To satisfy the knowledge element, an aider and abettor must have actual
8 knowledge of the specific primary wrong the defendant substantially assisted." See Diaz
9 v. Intuit, Inc., 2018 WL 2215790, at *6 (N.D. Cal. May 15, 2018); see also Casey, 127
10 Cal. App. 4th at 1147 (noting "suspicion and surmise do not constitute actual
11 knowledge"). Moreover, for purposes of pleading, "[b]oilerplate and conclusory
12 allegations are insufficient to establish that a [defendant] had actual knowledge." See
13 Namer v. Bank of Am., N.A., 2017 WL 1180193, at *5 (S.D. Cal. Mar. 30, 2017) (granting
14 motion to dismiss aiding and abetting breach of fiduciary duty claim; finding plaintiff's
15 "conclusory" allegations "fail[ed] to plausibly establish [defendant] had actual knowledge
16 of the alleged wrongful conduct"); see also Casey, 127 Cal. App. 4th at 1148, 1152
17 (affirming dismissal of aiding and abetting claim; finding "general allegation the
18 [defendant] banks knew the [fiduciaries] were involved in 'wrongful or illegal conduct' d[id]
19 not constitute sufficient pleading that the banks had actual knowledge the [fiduciaries]
20 were *misappropriating funds*," the "specific primary violation" (emphases in original)).

21 By the March 25 Order, Judge Koh dismissed this claim, finding Lynwood's
22 allegations were "conclusory" and "d[id] not plausibly establish" that Runa Capital and E.
23 Ventures "knew about the [Disloyal Employees'] alleged fraudulent conduct." (See March
24 25 Order at 27:11-12.) Specifically, Judge Koh characterized as conclusory Lynwood's
25 allegation that Runa Capital and E. Ventures "knew about the Disloyal Employees'
26 obligations to Rambler and the Team's fraudulent conduct against Rambler' based on
27 their 'extensive due diligence leading up to their . . . investment in October" (see id. at
28 27:7-10), and found such allegation "especially insufficient in light of other allegations that

1 suggest[ed] that [Runa Capital and E. Ventures] believed the Disloyal Employees had not
2 engaged in fraudulent conduct,” specifically, allegations that Runa Capital and E.
3 Ventures’ funding term sheet required a legal opinion by the company’s counsel that
4 Konovalov, Sysoev, and Alexeev’s “activities ‘do not and will not conflict with any
5 agreement, commitment or other encumbrance placed on them by their current or former
6 employer” (see id. at 27:16-18).

7 In the AC, Lynwood repeats the above conclusory allegation as to Runa Capital’s
8 and E. Ventures’ knowledge, which, as Judge Koh found, is insufficient, and its new
9 allegations, which make reference only to Runa Capital, fare no better. In that regard, to
10 establish Runa Capital’s knowledge, Lynwood now alleges Runa Capital in February
11 2011 hired Rambler’s Director of Strategic Development, Dmitry Galperin (“Galperin”)
12 “explicitly for the purpose of encouraging and assisting Sysoev and Konovalov and
13 coordinating with them to carry out the conspirators’ common plan (i.e., the
14 misappropriation and subsequent sale of the NGINX Enterprise).” (See AC ¶ 61; see
15 also, e.g., AC ¶ 60 (alleging “Galperin left Rambler’s employment in furtherance of the
16 conspiracy”), ¶ 561 (alleging Runa Capital “hired [Galperin] in a deliberate move to gain
17 influence over the Team going forward”), ¶ 561 (alleging “Galperin provided Runa Capital
18 with detailed information of Rambler’s inner workings and the Team’s conspiracy”)).
19 None of those new allegations, however, are supported by factual allegations.

20 Accordingly, the Court finds Lynwood fails to state a claim against Runa Capital
21 and E. Ventures for aiding and abetting of the Disloyal Employees’ fraud and breaches of
22 their duties of honesty and loyalty.

23 **2. Eighth Claim for Relief – Aiding and Abetting by F5 of the Disloyal
24 Employees’ Fraud and Breaches of Their Duties of Honesty and
Loyalty to Rambler**

25 As with the Seventh Claim for Relief, the parties disagree as to whether California
26 law or Russian law governs the Eighth, and defendants again argue that even under
27 California law, the claim fails.

28 By the March 25 Order, Judge Koh dismissed this claim, finding Lynwood “ha[d]

1 not plausibly alleged that F5 . . . had actual knowledge" of the Disloyal Employees' torts.
2 (See March 25 Order at 26:14-16.) Specifically, Judge Koh found Lynwood's
3 "conclusory" allegations that "F5 had knowledge of the Disloyal Employees' obligations
4 and the Team's fraudulent conduct against Rambler 'as a result of F5's due diligence'
5 prior to the [2019] [M]erger, and 'as a sophisticated entity with international offices,' . . .
6 d[id] not plausibly establish that F5 had knowledge of the alleged theft of the NGINX
7 Enterprise that occurred in 2011, years before the 2019 [M]erger" (see *id.* at 26:18-24),
8 and were "especially insufficient because other allegations suggest[ed] that F5 believed
9 the Disloyal Employees had not engaged in fraudulent conduct with respect to Rambler,"
10 namely, allegations that the merger agreement "represents and warrants that 'no
11 employee or independent contractor of the Company or any Subsidiary is in breach of
12 any Contract with any former employer or other Person concerning Intellectual Property
13 Rights or confidentiality'" (see *id.* at 26:25-27:3).
14

15 In the AC, Lynwood repeats the above-referenced conclusory allegation as to F5's
16 knowledge, and adds allegations that F5 conducted a "review of the Disloyal Employees'
17 past employment and separation agreements with Rambler" (see AC ¶ 639), an "analysis
18 of Open Source NGINX and NGINX Plus along with the other proprietary NGINX
19 commercial add-on software developed from the purloined NGINX Enterprise" (see AC
20 ¶ 639), and a "review of the Disloyal Employees' contemporaneous electronic
21 communications from the time when the Disloyal Employees were scheming to lift the
22 NGINX Enterprise out of Rambler" (see AC ¶ 640). According to Lynwood, the above-
23 referenced due diligence "revealed that the code commits by Sysoev for [Open Source
24 NGINX and NGINX Plus] were performed while he was a Rambler employee." (See AC
25 ¶ 639.) In support thereof, Lynwood alleges that "a significant number of modifications to
26 Open Source NGINX," namely, "2174 changes were committed . . . by Sysoev during a
27 standard business-hours workday window at Rambler." (See AC ¶ 196.) The AC
28 contains no similar allegation as to NGINX Plus, however, and as discussed earlier
herein, defendants never concealed that they were working on Open Source NGINX.

1 Moreover, even if such allegations suggest F5 may have had some suspicion as
2 to the development of NGINX Plus, actual knowledge requires “more than a vague
3 suspicion of wrongdoing,” see In re First All. Mortg. Co., 471 F.3d 977, 993 n.4 (9th Cir.
4 2006), and Lynwood fails to plausibly demonstrate F5 actually concluded or otherwise
5 knew the Disloyal Employees breached their duties or defrauded Rambler. See Casey,
6 127 Cal. App. 4th at 1149 (finding allegations that defendant banks knew fiduciaries
7 “were withdrawing money . . . with . . . forged checks,” and “carrying large, unreported
8 amounts of cash out of the bank in unmarked duffel bags” to “essentially allege[] the
9 banks knew *something* fishy was going on” (emphasis in original); finding such
10 allegations insufficient to establish banks knew fiduciaries were misappropriating funds).

11 Further, as Judge Koh found, Lynwood’s allegations are “especially insufficient”
12 (see March 25 Order at 26:25) given Lynwood’s other allegations indicating F5
13 reasonably acted on the assumption that the Disloyal Employees had not breached their
14 duties or defrauded Rambler. (See AC ¶ 403 (alleging merger agreement “contain[ed] a
15 number of representations and warranties” that Disloyal Employees were not in breach of
16 any contract with any former employer concerning intellectual property matters).)
17 Although Lynwood now alleges F5’s “negotiating an indemnity from NGINX BVI for any
18 breaches in NGINX BVI’s representations and warranties regarding the NGINX
19 intellectual property” shows F5 had “actual knowledge” that the “NGINX Enterprise was
20 owned by Rambler” (see AC ¶ 406), such conclusory allegation constitutes no more than
21 speculation and, consequently, its reliance thereon is unavailing.

22 Moreover, all of the above allegations pertain to knowledge allegedly acquired
23 seven to eight years after the Disloyal Employees allegedly breached their duties to act
24 fairly and honestly with Rambler, which duties and allegedly fraudulent conduct, as
25 discussed earlier herein, would have ended when Konovalov, Sysoev, and Smirnoff
26 resigned from Rambler in, respectively, April 2011, December 2011, and November
27 2012. See supra Sections III.A.1.b-c.

28 Accordingly, the Court finds Lynwood fails to state a claim against F5 for aiding

1 and abetting of the Disloyal Employees' fraud and breaches of their duties of honesty and
2 loyalty.

3 **3. Ninth Claim for Relief – Tortious Interference with Contract Against
4 Konovalov, Robertson, NGINX Software, Inc., NGINX BVI, and
NGINX DE**

5 Lynwood contends California law governs this claim. Defendants contend Russian
6 law governs,¹⁴ but argue that even under California law, the claim fails.

7 To state a claim for tortious interference with contract under California law, a
8 plaintiff must allege: "(1) a valid contract between plaintiff and a third party; (2)
9 defendant's knowledge of this contract; (3) defendant's intentional acts designed to
10 induce a breach or disruption of the contractual relationship; (4) actual breach or
11 disruption of the contractual relationship; and (5) resulting damage." See Pac. Gas &
12 Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990). Conclusory allegations
13 that the defendant was aware of the contract are insufficient to state a claim. See Sun
14 Grp. U.S.A. Harmony City, Inc. v. CRRC Corp. Ltd., 2018 WL 10689420, at *11 (N.D.
15 Cal. July 9, 2018) (granting motion to dismiss claim for interference with contractual
16 relations where plaintiff "fail[ed] to plead any non-conclusory facts to show that any of
17 the[] [d]efendants were aware of the [contract]").

18 By the March 25 Order, Judge Koh dismissed this claim as to NGINX Software,
19 Inc. and NGINX BVI,¹⁵ finding Lynwood "never allege[d] that [they] were aware of the
20 contracts between [Sysoev] and Rambler." (See March 25 Order at 28:15-16.)¹⁶
21 Specifically, Judge Koh found "[t]he only allegation that Lynwood makes on this point is
22 that 'Konovalov's knowledge concerning Sysoev's ongoing obligations to Rambler is

23
24 ¹⁴ There is no dispute that under Russian law, a "standalone cause[] of action" for
tortious interference with contract does not exist. (See Muranov Reply Decl. ¶ 42.)

25 ¹⁵ At the time Judge Koh issued her order, NGINX DE was in default and, to date,
26 remains so.

27 ¹⁶ By the March 30 Order, Judge Koh dismissed this claim as to Konovalov and
28 Robertson as untimely, but did not go on to address those defendants' argument that
Lynwood also failed to state a claim.

1 imputed onto the NGINX Conspirators^[17] and/or the NGINX Conspirators otherwise knew
2 of Sysoev's ongoing obligations," which allegation she described as "conclusory." (See
3 id. at 28:17-20.)

4 In the AC, Lynwood repeats the above-referenced conclusory allegation (see AC
5 ¶ 656) and, in support thereof, citing Herzog v. Cap. Co., 27 Cal. 2d 349, 353 (1945),
6 asserts that "[u]nder California law, the knowledge of an agent is imputed to the
7 principal." (See Pl.'s Opp'n at 22:6-7.) In Herzog, however, the court found it was "clear"
8 that the agent "was acting within the scope of his authority" when he engaged in the
9 allegedly tortious acts, see Herzog, 27 Cal. 2d at 353, whereas here, the AC includes no
10 factual allegations upon which such a finding could be based in that, as discussed below,
11 the AC contains no allegations specifying the acts constituting the alleged tortious
12 interference. Consequently, as to NGINX Software, Inc., NGINX BVI, and NGINX DE,
13 Lynwood fails to state a claim for tortious interference with contract.

14 Next, as to Konovalov and Robertson, Lynwood fails to allege any "intentional acts
15 designed to induce a breach" of Sysoev's contractual obligations. See Jenni Rivera
16 Enterprises, LLC v. Latin World Ent. Holdings, Inc., 36 Cal. App. 5th 766, 788-89 (2019)
17 (where manager of celebrity, by disclosing information to producers of TV series based
18 on celebrity's life, allegedly breached agreement restricting disclosure of celebrity's
19 personal information, TV series producers' intentional acts of "making payments" to
20 manager as executive producer of series, and "marketing [series] to promote [his] role in
21 its production" sufficed to support reasonable inference that producers induced manager
22 to breach nondisclosure agreement by participating in series production) (internal
23 quotation, citation, and alteration omitted). Although Lynwood sets forth in the AC
24 various acts committed by Sysoev in breach of his contractual obligations, Lynwood's
25 only allegation as to Konovalov and Robertson is that they "intended to cause Sysoev to

27 ¹⁷ In the initial Complaint, NGINX BVI, NGINX Software, Inc., BV NGINX, and
28 NGINX DE are collectively referred to as the "NGINX Conspirators." (See Compl. ¶ 538,
Dkt. No. 1.)

1 breach his obligations to Rambler" (see AC ¶ 660) and "actively encouraged and
2 persuaded Sysoev to breach his obligations to Rambler" (see AC ¶¶ 658-59), which
3 conclusory allegations, absent factual support, are insufficient.

4 Accordingly, the Court finds Lynwood fails to state a claim for tortious interference
5 with contract.

6 **4. Twelfth Claim for Relief – Tortious Interference with Prospective
7 Business Advantage Against All Defendants**

8 Lynwood contends California state law applies to this claim. Defendants contend
9 Russian law governs,¹⁸ but argue that even under California law, the claim fails.

10 To state a claim for tortious interference with prospective business advantage, a
11 plaintiff must allege: "(1) an economic relationship between the plaintiff and some third
12 party, with the probability of future economic benefit to the plaintiff; (2) the defendant's
13 knowledge of the relationship; (3) intentional acts on the part of the defendant designed
14 to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm
15 to the plaintiff proximately caused by the acts of the defendant." See Westside Ctr.
16 Assocs. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 521-22 (1996). To plead such
17 a claim for tortious interference, "it is essential that the plaintiff allege facts showing that
18 the defendant interfered with the plaintiff's relationship with a particular individual." See
19 UMG Recordings, Inc. v. Glob. Eagle Ent., Inc., 117 F. Supp. 3d 1092, 1117 (C.D. Cal.
20 2015).

21 By the March 25 Order, Judge Koh dismissed this claim as to NGINX BVI, NGINX
22 Software, Inc, BV NGINX, E. Ventures, Runa Capital, and F5, finding "Lynwood failed to
23 plead an existing economic relationship with an identifiable buyer." (See March 25 Order
24 at 29:19-20.)¹⁹

25 _____
26 ¹⁸ There is no dispute that under Russian law, a "standalone cause[] of action" for
27 tortious interference with prospective business advantage does not exist. (See Muranov
Reply Decl. ¶ 42.)

28 ¹⁹ By the March 30 Order, Judge Koh dismissed this claim as to Konovalov,
Sysoev, Alexeev, Dounin, Smirnoff, and Robertson as untimely, but did not go on to

1 In the AC, Lynwood now lists a number of companies the Team had identified in
2 early 2011 as potential buyers of the NGINX Enterprise. (See AC ¶ 697 (alleging “the
3 Team identified the following potential purchasers of the fully financed and developed
4 NGINX Enterprise . . .”).) Lynwood fails to allege, however, the Team had a relationship
5 with any of those companies, let alone that Rambler had such a relationship. Rather,
6 Lynwood alleges Rambler “would have had many options” and “the same or similar
7 opportunities” to sell the NGINX Enterprise (see AC ¶¶ 696, 699), which allegations do
8 not suffice to allege Rambler had “an existing economic relationship with an identifiable
9 buyer.” (See March 25 Order at 29:19); Westside, 42 Cal. App. 4th at 523 (dismissing
10 claim where plaintiff alleged defendant “interfered not with a particular sale but with
11 [plaintiff’s] ‘opportunity’ to sell the property for its true value”); see also UMG Recordings,
12 117 F. Supp. 3d at 1117 (finding “[a]llegations that a defendant interfered with a
13 relationship with an as yet unidentified customer will not suffice”) (internal quotation and
14 citation omitted).²⁰

15 Lynwood’s allegations that Rambler had relationships with an American company,
16 “Google AdWords,” since 2013, and two Russian companies, “Yandex” and “Mail.ru,”
17 since 2015 (see AC ¶¶ 703-04), likewise are unavailing, as a claim for tortious
18 interference with prospective business advantage requires “knowledge of the existence of
19 a relationship on the part of the defendant,” see Westside, 42 Cal. App. 4th at 526, and
20 Lynwood fails to allege defendants knew of Rambler’s purported relationships with any of
21 the aforementioned companies.

22 Accordingly, the Court finds Lynwood fails to state a claim for tortious interference

23
24 address those defendants’ argument that Lynwood also failed to state a claim.

25 ²⁰ Although Lynwood argues “the NGINX Enterprise was owned by Rambler and
26 therefore Lynwood can rely on the relationships between the NGINX Enterprise and third
27 parties for purposes of its tortious interference claim” (see Pl.’s Opp’n at 22:20-22),
28 Lynwood cites no authority for such proposition, and, in any event, Lynwood, as noted,
does not allege any defendant or “the NGINX Enterprise” actually had a relationship with
any 2011 buyer, only that potential buyers had been identified.

with prospective business advantage.

5. Thirteenth Claim for Relief – Fraud Against the Disloyal Employees, NGINX Software, Inc., NGINX DE and NGINX BVI

Lynwood contends California state law applies to this claim. Defendants contend Russian law governs,²¹ but argue that even under California law, the claim fails.

To state a claim for fraud under California law, a plaintiff must allege: "(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." See Hoffman, 228 Cal. App. 4th at 1185-86. In addition, as noted, "[a] fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact." See *id.* at 1186.

By the March 25 Order, Judge Koh dismissed this claim as to NGINX BVI and NGINX Software, Inc., finding “Lynwood ha[d] not pled a duty that [those entities] owed to Rambler.” (See March 25 Order at 30:9-10.)²² In that regard, Judge Koh noted said defendants were “competitors of Rambler with no fiduciary or transactional ties to Rambler.” (See *id.* at 30:10-11.)

In the AC, Lynwood again fails to plead NGINX Software, Inc., NGINX BVI, and NGINX DE owed any duty to Rambler. Rather, Lynwood now alleges that, because Sysoev and Smirnoff were “principals” of NGINX Software, Inc., NGINX BVI, and NGINX DE, their “duties to disclose their fraudulent conduct were imputed” to those entities. (See AC ¶ 722.) In support of said proposition, Lynwood, citing In re Tesla, Inc. Sec. Litig., 477 F. Supp. 3d 903, 926 (N.D. Cal. 2020), argues “a corporation can be liable for the fraud committed by its officers, so long as the officer commits it within the scope of

²¹ There is no dispute that under Russian law, a “standalone cause[] of action” for “fraudulent misrepresentation and/or fraudulent concealment” does not exist. (See Muranov Reply Decl. ¶ 42.)

²² By the March 30 Order, Judge Koh dismissed this claim as to the Disloyal Employees as untimely, but did not go on to address those defendants' argument that Lynwood also failed to state a claim.

1 his or her employment" (see Pl.'s Opp'n at 22:26-28) and, similarly, citing Bank of New
2 York v. Fremont Gen. Corp., 523 F.3d 902, 911 (9th Cir. 2008), argues "an employee's
3 knowledge will generally be imputed to the corporation so long as the employee is acting
4 within the scope of his or her employment" (see Pl.'s Opp'n at 23:3-4). In both those
5 cases, however, there was no question that the corporate officer, when engaged in the
6 allegedly wrongful conduct, was acting in the scope of his employment with the corporate
7 defendant and that the corporate defendant itself owed a duty to the plaintiff therein,
8 namely, a duty under the Securities Exchange Act of 1934, see In re Tesla, 477 F. Supp.
9 3d at 921, and a duty under a written contract, see Bank of New York, 523 F.3d at 911.

10 Here, by contrast, the alleged wrongful conduct on the part of Sysoev and
11 Smirnoff, namely, false representations and concealment, was committed in the scope of
12 their employment at Rambler, not in the scope of their employment at NGINX Software,
13 Inc., NGINX BVI, and NGINX DE, and Lynwood cites no case supporting its contention
14 that their duty to Rambler, as employees of Rambler, can be imputed to an entity that
15 owes no such duty.

16 Accordingly, the Court finds Lynwood fails to state a claim for fraud as alleged
17 against NGINX Software, Inc., NGINX BVI, and NGINX DE. Although the Court has not
18 found Lynwood fails to state a claim for fraud as alleged against the Disloyal Employees,
19 that claim, as discussed earlier herein, is time-barred. See supra Section III.A.3.

20 **6. Fourteenth Claim for Relief – Direct Copyright Infringement Against
21 Defendants Konovalov, Sysoev, Alexeev, Dounin, Smirnoff, NGINX
22 BVI, NGINX Software, Inc., NGINX DE, Robertson and F5**

23 To state a claim for copyright infringement, a plaintiff must allege: "(1) ownership
24 of a valid copyright, and (2) copying of constituent elements of the work that are original." See Feist Publications, Inc. v. Rural Tel. Serv. Inc., 499 U.S. 340, 361 (1991). Further, a
25 plaintiff "must identify with specificity which work or works were copied" and specify
26 "which [d]efendant is alleged to have infringed which particular copyright." See Iglesia Ni
27 Cristo v. Cayabyab, 2018 WL 4674603, at *6-7 (N.D. Cal. Sept. 26, 2018).

28 By the March 25 Order, Judge Koh dismissed this claim as to NGINX BVI, NGINX

1 Software, Inc., BV NGINX, Runa Capital, E. Ventures, and F5, finding Lynwood “failed to
2 plausibly allege” that they “copied the constituent elements of the work.” (See March 25
3 Order at 30:21-22.)²³ Specifically, Judge Koh, noting a plaintiff “must identify which
4 [d]efendant is alleged to have infringed which particular copyright,” found Lynwood
5 “lump[ed] all the defendants together without stating which entity or person copied the
6 work.” (See id. at 30:22-23, 31:1-2.) Moreover, Judge Koh found Lynwood’s allegations
7 that Runa Capital and E. Ventures “bought into the plan and funded it,” rather than
8 “copied the work,” to “believe the notion that all defendants copied the work.” (See id. at
9 31:4-6.)

10 The Court first notes that Lynwood fails to adequately identify in the AC which
11 particular work or works were copied.²⁴ Lynwood now identifies the copyrighted work as
12 “Pre-2012 NGINX Software,” which it defines as “NGINX Plus and Open Source NGINX,
13 in both source code and executable form, conceived and/or developed before the end of
14 2011, when Sysoev left the employ of Rambler.” (See AC ¶ 745; see also AC ¶ 15
15 (defining “NGINX Plus” as “proprietary NGINX software code”); ¶ 9 (defining “Open
16 Source NGINX” as “NGINX software released to the public as ‘open source’ code”)).
17 Although Lynwood argues “the term ‘Pre-2012 NGINX Software’ is precise because it
18 identifies the specific iterations of Open Source NGINX and NGINX Plus that Sysoev
19 wrote as works for hire under Russian law while he was employed by Rambler” (see Pl.’s
20 Opp’n at 25:5-7 (citing AC ¶¶ 25, 191)), no such specific iterations can be identified from
21 the paragraphs Lynwood cites in support of such allegation. (See AC ¶ 25 (alleging
22

23 _____
24 ²³ By the March 30 Order, Judge Koh dismissed this claim as to Konovalov,
Sysoev, Alexeev, Dounin, Smirnoff, and Robertson as untimely, but did not go on to
address those defendants’ argument that Lynwood also failed to state a claim.

25 ²⁴ Although Judge Koh did not reach the issue in connection with her assessment
26 of the initial Complaint, inadequacy of identification was raised as a ground for dismissal
27 at that time. (See Mot. to Dismiss, filed Sept. 30, 2020, by Defs. Maxim Konovalov, Igor
28 Sysoev, Andrey Alexeev, Maxim Dounin, Gleb Smirnoff, Angus Robertson at 12:25-26,
Dkt. No. 106; Mot. to Dismiss, filed Aug. 28, 2020, by Defs. F5 Networks, Inc., NGINX,
Inc. (BVI) and NGINX Software, Inc. at 16:11-18:8, Dkt. No. 88.)

1 Sysoev “claims to have written ninety-seven (97) percent of Open Source NGINX”); ¶ 191
2 (alleging Sysoev “has maintained that he authored ninety-seven percent of Open Source
3 NGINX as of 2011”.) Moreover, Lynwood’s definition fails for the additional reason that it
4 includes software “conceived” but not developed at Rambler. See L. v. Sony Music Ent.,
5 Inc., 448 F.3d 1134, 1140 (9th Cir. 2006) (noting “[c]opyright protects original works of

6 authorship fixed in any tangible medium of expression”).

7 Equally, if not more, importantly, Lynwood, in alleging infringement, again lumps
8 together all defendants against whom the claim is brought, in this instance, Konovalov,
9 Sysoev, Smirnoff, Alexeev, Dounin, NGINX Software, Inc., NGINX BVI, NGINX DE,
10 Robertson, and F5, i.e., the newly named “Direct Copyright Infringement Defendants.”
11 (See, e.g., AC ¶ 755 (alleging “[t]he Direct Copyright Infringement Defendants have
12 engaged in and are engaging in reckless, blatant, willful, and repeated infringement of
13 [p]laintiff’s copyright rights”); ¶ 759 (alleging “[t]he Direct Copyright Infringement
14 Defendants . . . have introduced 20 or more commercial releases of NGINX Plus”.)
15 Such collective allegations do not suffice to plead a viable infringement claim. See
16 Bravado Int’l Grp. Merch. Servs. v. Cha, 2010 WL 2650432, at *6 (C.D. Cal. June 30,
17 2010) (dismissing claim where plaintiff “lumped all [d]efendants together” and “d[id] not
18 demonstrate which groups infringed which . . . copyrights”; noting “it is not the [c]ourt’s
19 responsibility to sort them out for [p]laintiff”).

20 Accordingly, the Court finds Lynwood fails to state a claim for copyright
21 infringement.

22 **IV. CONCLUSION**

23 For the reasons set forth above, defendants’ motion to dismiss the AC is hereby
24 GRANTED, and the First, Second, Fourth, Seventh, Eighth, Ninth, Twelfth, Thirteenth,
25 and Fourteenth Claims for Relief are hereby DISMISSED without further leave to amend.
26 (See March 25 Order at 33:4-6 (warning “failure to cure deficiencies identified herein or
27 identified in the instant motions to dismiss or the Individual Defendants’ motion to
28 dismiss, will result in dismissal of the deficient claims with prejudice”; dismissing claims in

initial Complaint corresponding to Seventh, Eighth, Ninth, Twelfth, Thirteenth, and Fourteenth Claims for Relief); March 30 Order at 37:5-8 (warning “failure to cure deficiencies identified in this Order, the [March 25 Order], the instant motion to dismiss, or the F5 Entities’ and Outside Investors’ motions to dismiss, will result in dismissal of the deficient claims with prejudice”; dismissing claims in initial Complaint corresponding to First, Second, Fourth, Ninth, Twelfth, Thirteenth, and Fourteenth Claims for Relief).)²⁵

IT IS SO ORDERED.

Dated: August 16, 2022

MAXINE M. CHESNEY
United States District Judge

United States District Court
Northern District of California

²⁵ Although NGINX DE is, as noted, in default and has not moved to dismiss the AC (see Clerk's Notice of Entry of Default Against Def. NGINX, Inc. (DE), Dkt. No. 71), the Court also dismisses as to NGINX DE those claims that are asserted against it, specifically, the Ninth, Twelfth, Thirteenth, and Fourteenth Claims for Relief. See Silverton v. Dept of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding, where court grants motion to dismiss complaint as to moving defendants, court may dismiss complaint against non-moving defendant "in a position similar to that of moving defendants").